In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 228

GENE ROBERT TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted on three counts charging him with aiding and abetting another to sell and dispose of a stolen vehicle transported in interstate commerce, in violation of 18 U.S.C. 2, 2312 and 2313. On January 23, 1969, he was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. A).

The evidence which is detailed in the opinion below (Pet. App. 13-17) showed that two stolen Cadillacs had been purchased by Samuel Hooker and I. L. Gammons, both of Clarksville, Tennessee. Both buyers

testified that they had purchased the cars—in April and May 1968 respectively—from two men dressed in Army fatigues. Both positively identified petitioner as one of the two men (Tr. 90, 188). Their testimony concerning the identity of petitioner was corroborated by the employees of the victims (Tr. 118, 221).

Several witnesses testified that these Cadillacs had been registered in the name of "Anthony Wallace" [1] and that the registrations were forged (Tr. 154, 241). An FBI investigation revealed that these two stolen automobiles had moved in interstate commerce prior to these two sales. A warrant was issued on June 8, 1968, for the arrest of petitioner. On August 21, 1968, two FBI agents arrested petitioner at the home of his mother-in-law in Louisville, Kentucky (Tr. 28).[2] Incident to the arrest, the agents searched the room in which he was found and seized two sets of Army fatigues, receipts for a rented typewriter, and telephone bills addressed to petitioner reflecting phone calls made from the Louisville residence to the business phones of t' car buyers in Clarksville (Tr. 30-35). These items were later admitted into evidence after a pre-trial motion to suppress had been denied.

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[1] At his meeting with Mr. Hooker, petitioner identified himself as "Wallace's cousin" and the other man identified himself as Wallace (Tr. 83).

[2] As the opinion of the court of appeals notes (Pet. App. 15), the transcript reveals no reason for the month and a half delay between the procurement of the arrest warrant and its execution.

1. Petitioner argues that the admission of testimony concerning the forging of car registrations by him subsequent to his arrest was prejudicial error. The testimony, however, was elicited by petitioner's own counsel on cross-examination, and should therefore not be a basis for an assertion of prejudice.[3] See *United States* v. *Burnett*, 418 F. 2d 912 (C.A. 9); *Felton* v. *United States*, 170 F. 2d 153 (C.A.D.C.), certiorari denied, 335 U.S. 831. The evidence was, in any event, admissible to demonstrate the system employed by petitioner when selling stolen automobiles, and as tending to establish his guilty knowledge (see Pet. App. 19). See also *United States* v. *Baker*, 418 F. 2d 851 (C.A. 6); *Tandberg-Hanssen* v. *United States*, 284 F. 2d 331 (C.A. 10).

Before the testimony had been heard by the jury, petitioner's counsel moved for a continuance in order to obtain all persons connected with the charges pending in Hardin County, Kentucky (Tr. 270). Significantly, he did not claim surprise at the evidence or allege that he had no time to prepare a rebuttal. He made no attempt to name the witnesses he sought or what the proposed testimony would reveal. Moreover, the evidence dealt only with a collateral issue

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[3] The evidence came from Mrs. Barbara Coffer, Deputy Clerk of the Hardin County, Kentucky, Clerk's Office. She stated that petitioner, on September 28 and October 12, 1968 (over a month after his arrest in the instant case), had registered Cadillacs in the name of Anthony Wallace and had identified himself to her as the brother of Wallace (Tr. 272-274). On cross-examination, the witness disclosed that charges against petitioner for false swearing of affidavits in connection with these registrations were pending in Hardin County Court (Tr. 281).

at best. Under the circumstances, the trial court did not abuse its discretion in denying the motion. *Gardiner* v. *United States*, 321 F. 2d 159 (C.A. 5); *Foster* v. *United States*, 296 F. 2d 65 (C.A. 5); cf. *Unger* v. *Sarafite*, 376 U.S. 575.

2. Petitioner further urges that the search incident to the arrest was invalid under *Chimel* v. *California*, 395 U.S. 752 (assuming that case is deemed to have retroactive application), but even if not the Fourth Amendment was violated by the instant search under pre-*Chimel* standards. The latter contention is insubstantial. The search was contemporaneous with the arrest which took place in the house (contrast *Vale* v. *Louisiana*, No. 727, 1969 Term, decided June 22, 1970), was limited to the room in which the arrest was actually made and resulted in the seizure of evidence directly connected to the illegal scheme for which petitioner was arrested. See *Warden* v. *Hayden*, 387 U.S. 294; *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145.

The further contention in this regard—that the delay between issuance of the arrest warrant and petitioner's arrest vitiated the legality of the search since, in that time, no search warrant had been obtained—is equally without merit. Unlike the situation with regard to the execution of search warrants, the Federal Rules of Criminal Procedure provide no time limit for the execution of arrest warrants. Compare Rule 4(c) with Rule 41(d). As this Court has pointed out, "[t]here is no constitutional right to be arrested." *Hoffa* v. *United States*, 385 U.S. 293, 310. Nor has petitioner shown anything to support the

suggestion (see Pet. 9) that the arrest here was delayed until petitioner was present in the home of his mother-in-law so that a search without a warrant incidental to the arrest could be justified.

With respect to the *Chimel* claim, its retroactivity *vel non* is presently pending for decision before this Court in *Williams* v. *United States*, No. 1125, 1969 Term, certiorari granted, 397 U.S. 986—a case in which the claim is made on direct appeal and the holding in which will presumably govern this case—and in *Elkanich* v. *United States*, No. 1142, 1969 Term, certiorari granted, 396 U.S. 1057, where the issue is raised in an action for post-conviction relief. Accordingly, this Court may deem it appropriate to defer action on the instant petition, insofar as this issue is concerned, until *Williams* and *Elkanich* have been decided.[4]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

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[4] We note that the court below—which held *Chimel* prospective only—further concluded that, in any event, the introduction of the items seized on the search constituted harmless error under the principles of *Chapman* v. *California*, 386 U.S. 18, and *Harrington* v. *California*, 395 U.S. 250, since "if the seized evidence had never been introduced there still would be sufficient evidence in the record to find Turner guilty beyond a reasonable doubt" (Pet. App. 18-19). Our reading of the record, however, leaves us with the view that the harmless error argument presents an extremely close question in the context of this case.

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